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Ontario Labour Relations Board HIGHLIGHTS

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Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. These decisions will appear in the June/July issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Discharge – Interim Relief – Unfair Labour Practice – The union sought interim reinstatement of its key inside organizer, McDonell, who was discharged during an organizing drive – The employer claimed it knew nothing of the organizing drive and that McDonell was fired for the rude and belligerent way he complained about the "swing shift system" – The Board found an appearance of a causal relationship between McDonell's termination and his exercise of rights under the Act because of the following elements: he was a 6 year employee with no discipline record; he had complained before about the "swing shift system" without discipline; other employees complained, even rudely, and were not disciplined; the organizing drive had lasted a few weeks involving some 30 employees and hence it was likely the employer was aware of it; the ostensible reason for the termination was closely related to the lawful activities of discussing working terms and conditions – The other criteria set out in s. 98.1 were met and the Board ordered interim reinstatement, among other orders – Relief granted

CORNWALL GRAVEL CO. LTD.; RE Labourers' International Union of North America, Local 527; File No. 0830-06-M; Dated June 30, 2006; Panel: Mary Ellen Cummings (6 pages)

Bargaining Unit – Certification – Construction Industry – Sector Determination – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE Central Ontario Regional council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America; File No. 1773-05-R; Dated June 13, 2006; Panel: Caroline Rowan (11 pages)

Discharge – Interim Relief – Unfair Labour Practice – Both the unfair labour practices complaint and the application for interim relief sought the reinstatement of an employee, who, the IBEW argued, was terminated because of assisting IBEW in an active organizing drive of K2 employees – The Board found the employer's action took place during an organizing campaign

and that the pending application raised a serious issue – Although the Board had serious concerns with whether IBEW could establish irreparable harm on the basis of chill to other employees, the Board did find that the union would suffer irreparable harm if the employee, as an insider organizer, was not reinstated – However the Board found that it appeared that the lay-off, suspension or discharge of the employee was unrelated to the exercise of rights under the Act for the following reasons: the employee had only worked for K2 for two hours before leaving for personal reasons; K2's reasons for not rehiring appeared reasonable (a practice for new employees precluded his return one week, and a mistaken belief about a contravention of the *TQAA*, precluded his return the next) – Additionally, IBEW's material attempting to link the non-return to the exercise of rights was problematic – Accordingly, section 98(3) precluded an order of reinstatement – Interim Application dismissed

K2 ELECTRICAL CONTRACTING LTD.; RE IBEW, Local 105; File No. 0663-06-M; 0664-06-U; Dated June 22, 2006; Panel: Ian Anderson (11 pages)

Certification Where Act Contravened – Construction Industry – Unfair Labour Practices – The certification and the ULP applications both indicated that the union might seek relief to be certified under section 11 of the Act – The employer made a motion on the first day of hearing to have the Board "strike" the reference to section 11 on both applications, arguing that once a trade union has made an application under section 128.1 it cannot "convert" the application to one brought pursuant to section 8 of the Act – The Board found it does have the power, pursuant to Rule 40.5, to permit an applicant to amend its application – The applicant must provide the Board with a reason to exercise its discretion – Whether the Board will permit a party to amend its application is a question of prejudice to other parties in the case and must be determined at the time the request is made – As the applicant was not seeking such an amendment at the time, the decision dealt only with whether an amendment to an application is available – Matter continues

L & L PAINTING AND DECORATING LTD.; RE The International Unions of Painters and Allied Trades, Local 557; File No. 4264-05-R; 0069-06-U; Dated June 27, 2006; Panel: David A. McKee (4 pages)

Discharge – Employment Standards – Reprisal – The Board reviewed an employment standards officer's finding that the claimant's termination did not result from a reprisal contrary to section 74 of the Act – The employer argued the claimant was terminated solely for circulating a petition to disband the dock committee – Circulating a petition was found not to be a protected activity under section 74 – The Board found however, that the petition was not the only reason for termination – The employee engaged in protected activity when he discussed hours of work and other rights under the Act with his coworkers – The employer was aware that the claimant was engaged in those discussions – The employer penalized the employee by way of termination – The employer intended to terminate because of those discussions – Remedial issues continue

NATIONAL FAST FREIGHT; RE Karl M. Ellison; File No. 0057-04-ES; Dated June 19, 2006; Panel: Ian Anderson (10 pages)

Certification – Construction Industry – Membership Evidence – Practice and Procedure – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

PRE ENG CONTRACTING; RE Construction Workers Local 52, affiliated with the Christian Labour Association of Canada; File No. 3798-05-R;
Dated June 14, 2006; Panel: David A. McKee (2 pages)

Certification – Practice and Procedure – Status – In order to determine status disputes about whether certain employees were employed "in, at and out of" a certain address, the Board directed particularized "will say" statements and at the hearing into the matter asked additional

questions to clarify some of the statements made – The Board found that where employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment – While the employees at issue sometimes worked "out of" the specific address, they were not primarily attached to this address – Matter continues

RAINBOW CONCRETE INDUSTRIES LTD.; RE International Union of Operating Engineers, Local 793; File No. 0116-06-R; Dated June 29, 2006; Panel: Ian Anderson (5 pages)

Employment Standards – The employer claimed that the respondent was not entitled to overtime since she failed to observe the company's policy, which prohibited employees from engaging in work beyond the regular work period, and required authorization from the supervisor for any overtime – The employer also argued that the Employment Standards Officer should not have considered meal periods in any calculation of overtime – The respondent claimed that she repeatedly obtained verbal permission to do overtime work, and did not receive an uninterrupted lunch period throughout the course of her employment – The Board determined that, in light of subsection 6(1) of *O. Reg. 285/01*, the applicant's policy on overtime did not exclude the respondent from obtaining accumulated overtime pay – The Board found that it was appropriate to include in the overtime calculation that period of time where the respondent did not have the opportunity to take an uninterrupted meal period – Application granted, in part

TCS EXPRESS INC.; RE Robina Yasin; File No. 3823-05-ES; Dated June 8, 2006; Panel: Patrick Kelly (7 pages)

Certification – Employer Support – Representation Vote – Trade Union – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA : RE : Association des employe(e)s de l'Universite d'Ottawa [AEUO] ; File No. 3215-05-R ; Dated June 5, 2006; Panel: Mary Anne Mckellar (5 pages)

Court Proceedings

Construction Industry – Judicial Review – *Public Sector Labour Relations Transition Act* – Related Employer – Sale of Business – Stay –

The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE International Brotherhood of Electrical Workers, Local 773 et al. File Nos. 1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R; Court File No. 126/06 Dated June 28, 2006; Panel: Matlow J.

Duty of Fair Representation – Judicial Review – The Court held that a dismissal of a duty of fair representation complaint for delay was subject to a standard of patent unreasonableness – The

Board's unpublished rule of thumb regarding delay was presumptive only, and the Board gave consideration to applicable criteria – There was nothing clearly irrational or so flawed in the Board's ruling to cause the Court to interfere with the decision – Application dismissed

JAMAL, NASEEM; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND THE OLRB; File No. 2464-03-U (Ct. File No. 567/04); Dated September 29, 2005; Panel: Greer, Chapnik, Lax JJ. (6 pages) Leave to Appeal to Court of Appeal dismissed February 3, 2006; Leave to Appeal to Supreme Court of Canada dismissed June 1, 2006

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
TTC v. Amalgamated Transit Union Divisional Court No. 261/06	0618-06-U; 0620-06-U	Pending
Abduraham, Abdoulrab v. Novaquest Finishing Divisional Court No. 327/06	2222-04-ES, 2223-04-ES, 2224-04-ES	Pending
D.M.S. Concrete & General Contracting v. Plasterer's Local 598 (Stated Case)	0330-06-G	Pending
D.M.S. Concrete & General Contracting v. Plasterer's Local 598 (Stated Case) Divisional Court No. 254/06	4212-05-G; 4213-05-G	Pending
Place Mont Roc v. United Steelworkers (Stated Case) Divisional Court No. 233/06	1684-05-U; 3719-05-U	Pending
City of Hamilton v. Carpenters, Local 18 Divisional Court No. 209/06	1785-05-R	Sept./Oct. 2006
Guild Electric Limited et al v. IBEW, Local 1739 Divisional Court No. 202/06	4179-05-U; 4307-05-M	Pending
Elena, De Monelli Foerster v. Toronto Catholic District School Board (Civil Suit) Divisional Court No. 06-CV-310231PD1	1373-04-U	Oct. 31, 2006
Bricklayers Local 7 v. 921879 Ontario Ltd. et al Divisional Court No. 06-DV-1209 OTTAWA	3261-04-JD; 3504-04-JD	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 78978/06 NEWMARKET	1838-05-U 2644-05-U	Pending
Greater Essex County District School Board v. International Brotherhood of Electrical Workers, Local 773 et al Divisional Court No. 126/06	1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R	August 15, 2006
Kostantinos Ioannidis v. Amalgamated Transit Union, Local 1572, Corp. of City of Mississauga, Transportation and Works Dept., Transit Division Divisional Court No. DC 0500947400	2287-04-U	August 30, 2006 (motion)
United Brotherhood of Carpenters v. United Brotherhood of Carpenters, Local 93 Divisional Court No. 01/06	2069-05-U; 3055-05-M	Pending
Gus Nedelkopoulos v. OLRB Divisional Court No. 77287/05 NEWMARKET	3704-04-U	Pending
Century Bldg. Restoration Inc. v. Universal Workers Union LIUNA Local 183, et al Divisional Court. No. 76931/05 NEWMARKET	1880-04-G	Pending
1333833 Ontario Inc. v. OLRB, Employment Standards Officer, Norstead Building Products Inc. Divisional Court No. DV-05-236	3559-04-ES	Pending
Association of Professional Ambulance Employees v. City of Toronto, Toronto Emergency Medical Services et al Divisional Court No. 44/04	2456-01-R	Pending

Case name & Court File No.	Board File No.	Status
Mississaugas of Scugog Island First Nation v. Great Blue Heron et al Divisional Court No. 10/04	1271-03-U; 1336-03-M; 1414-03-M	Dismissed – May 31, 2006, seeking leave to appeal to C.A.
Grantley Howell v. OLRB Divisional Court No. 04/178 HAMILTON	0933-01-U; 1273-01-U; 3552-00-U	Dismissed – April 13, 2006, seeking leave to appeal to C.A.
Naseem Jamal v. OPSEU et al Divisional Court No. 567/04	2464-03-U	Leave to C.A. dismissed Feb. 3/06, seeking leave to SCC; Dismissed June 1, 2006
Joseph S. Rooke v. OLRB and Stelco Hamilton Divisional Court No. 404/04	1584-02-OH; 2647-02-OH	June 27, 2006
Scaduto, Frank Divisional Court No. 382/05	1798-03-U; 4338-02-U	Pending
Tuquabo, Dawitt Divisional Court No. 03-DV-000935	2377-02-U	Dismissed Feb. 14/05; leave to appeal dismissed Jun 29/05; seeking leave to S.C.C.